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IN THE

Supreme Court of the United States

October Term 1969

No. 1476

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner

v.

JAMES ODELL SMITH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of James Odell Smith v. Norfolk and Western Railway Company, No. 12,477, which decision affirmed a judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

There was no opinion in the District Court reported. A copy of a Memorandum Opinion of Eugene A. Gordon, District Judge, is appended to this petition. The opinion of the Court of Appeals (Haynsworth, Bowman and Craven, Circuit Judges) has not yet been reported. A copy is appended to this petition.

JURISDICTION

The judgment of the United States Court of Appeals to be reviewed was entered March 4, 1969 and was filed by the Clerk on that date. Jurisdiction to review this case on a writ of certiorari is conferred by Title 28 Section 1254 (1)) of the United States Code.

QUESTION PRESENTED

Has the "operational activity" doctrine of *Sinkler* and related cases so transformed the rules for establishing agency in Federal Employers Liability Act cases, that Summary Judgment is appropriate when a railroad subcontracts a function it has agreed to perform, in spite of the fact that genuine issues of material fact may exist as to other criteria for determining agency?

STATUTE INVOLVED

The statute under which this action was brought is Section 51 of Title 45 United States Code, which reads as follows:

> "Section 51: Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE

This action was brought by James Odell Smith, an employee of Baker Driveaway Company, Inc., to recover damages of the Norfolk & Western Railway Company for injuries sustained in a fall from a railway car while unloading automobiles therefrom.

The action as commenced in the District Court alleged the applicability of the Federal Safety Appliance Act (45 USCA, §1, et seq.), the Federal Employers Liability Act (45 USCA, §51, et seq.) and diversity of citizenship jurisdiction. Only the question of Federal Employers Liability Act coverage is pertinent to this appeal.

Upon completion of initial discovery, both parties filed cross motions for summary judgment adjudicating whether Smith was an employee of the Railroad or of an independent contractor with respect to the Federal Employers Liability Act.

On April 26, 1967 the District Court filed a memorandum opinion, allows plaintiff's motion for summary judgment on the issue of coverage by the Federal Employers Liability Act. [App., p. 6A] Formal order allowing plaintiff's motion was entered September 15, 1967 [App., p. 11A]. The case was tried before a jury as if Smith were a Railway employee. Upon rendition on March 27, 1968 of a final judgment on a verdict for Smith, the Railroad appealed the granting of summary judgment for Smith and the denial of its own motion for summary judgment.

The Court of Appeals affirmed the judgment, holding in substance that since the Railroad tariff included unloading and Baker Driveaway had contracted with the Railroad to do the unloading, Baker Driveaway was engaged in the regular business of the Railroad and was its agent and Smith was thus an employee of the Railroad. This holding is the subject of this petition.

BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance is based upon applicability of the Federal Employers Liability Act, diversity of citizenship and the amount in controversy.

ARGUMENT

THE COURT OF APPEALS ERRED IN AFFIRMING A SUMMARY JUDGMENT THAT SMITH WAS A RAILROAD EMPLOYEE AT THE TIME OF HIS INJURY AND THUS ENTITLED TO THE BENEFITS OF THE FELA.

The principal ground for the petitioner's appeal to the Circuit Court was that it was difficult to perceive how on cross motions for summary judgment, the plaintiff's motion could be granted in the light of the conflicting facts and inferences in the case, and how the Court could rule as a matter of law that plaintiff was an employee of the Railroad. Rule 56 (c) of the Federal Rules of Civil Procedure sets forth the test to determine if summary judgment shall be granted. It states that

> "judgment sought shall be rendered forthwith if pleadings, depositions, admissions on file with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rules of Civil Procedure, Rule 56, 28 USCA.

Thus, if there is one genuine issue of any material fact present, a summary judgment shall not be granted. *Albert v. Brownell,* 219 F.2d 602 (9th Cir. 1955). Stated otherwise, the court has to decide whether there is a genuine issue of a material fact present and it does not have the responsibility of determining that issue. A motion for a summary judgment is not a trial of the facts. *Bergert v. Union Pacific Ry. Co.,* 240 F.2d 207 (8th Cir. 1957).

The issue in the case at bar was essentially one of agency: whether the plaintiff was an employee of an independent contractor or not. In *Ward v. Atlantic Coastline R.R. Co.,* 362 U.S. 396, 80 Sup. Ct. 789, 4. L.Ed.2d 820 (1960) and *Baker v. Texas Pacific Ry Co.,* 359 U.S. 227, 79 Sup. Ct. 664, 3 L.Ed.2d 756 (1959), this court specifically approved the ten tests set forth in the Restatement, Agency, 2d., §220 (1958) for consideration in determining whether one is a contractor or an agent. And it has been understood by the court and the bar that no one of the ten tests is determinative of the relationship. [1]

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1. It has been well said of the question that "[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative . . . [W]e think it perfectly plain that the question [of employment] . . . contains factual elements such as to make it one for the jury . . ." *Baker v. Texas Pacific Ry. Co.,* 359 U.S. 227, 228, 79 Sup. Ct. 664, 665 3 L.Ed.2d 756, 758.

In the case at bar, however, it can only be gathered that the Circuit Court apprehended that the rule set out in *Baker* and *Ward* had somehow only limited application to FELA cases because the Circuit Court focused on only one of the ten tests, "whether or not the work is a part of the regular business of the employer," [Restatement, Agency, 2d., §220 (h)] and concluded that plaintiff's employer was doing the regular business of the Railroad since the Railroad had undertaken in its tariff to unload the automobiles at their destination.

The Railroad had offered evidence by way of discovery, deposition and affidavit which raised material issues of fact as to a number of the other considerations and tests listed in the Restatement, Agency, 2d., §220, and hereto approved by this court: Restatement, Agency, 2d., §220, *Definition of Servant:*

"(2) In determining whether one acting for another is a servant or an independent contractor the following matters of fact, among others, are considered:

"(a) Whether the master, by the agreement, exercised control over the details of the work;"

In the case at bar, the defendant adduced evidence which would show that Baker Driveaway through its resident terminal manager had sole control over the details of the work, dictating the method to be followed, designating "lead men," hiring and firing, determining where unloaded automobiles were to be parked and in every respect handling the job as an independent contractor. Contra, the plaintiff remembered one sole occasion where a railroad employee allegedly criticized one of plaintiff's co-workers for driving too fast. On this point, the weight of the evidence was overwhelmingly in support of independent contractorship.

"(b) Whether or not the one employed is engaged in a distinct occupation or business;"

Baker Driveaway was an independent corporation formed in 1937 as a common carrier of new automobiles by motor transport. It engaged in the business of loading, unloading, and transporting new automobiles in interstate commerce. It was skilled in the arts of its

trade. As a common carrier with a franchise, it offered its service to those of the general public who would have need for the same. It operated two other terminals in the United States and was under contract with another railroad to unload new automobiles from railway cars. It was the consignee of these new automobiles under a contract with the Chrysler Corporation. Chrysler Corporation determined when and how many automobiles would be shipped to its consignee.

"(c) Whether the work is usually done under the supervision of the employer or by a specialist without supervision;"

On this point the defendant's evidence indicated a usual day to day operation with no Railroad supervision of of Baker Driveaway at all: The Railroad train crews simply unhitched the railroad cars on a side track and Baker Driveaway took over entirely. Indeed, there were no Railroad employees even present when the plaintiff was injured. Of course, Baker Driveaway rendered daily reports to the Railroad accounting for any damage done to the automobiles by it or the Railroad in shipping. But there was simply no evidence of any continuing Railroad supervision of the unloading operation.

"(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;"

Here the evidence was mixed: the Railroad supplied portable unloading ramps, leveling tools and ratchet bars at this public terminal. Baker Driveaway supplied ratchet bars, battery cables, saws, battery chargers, tire tools, a full repair shop and the facilities for dispensing gas and oil. Baker Driveaway leased a portion of the railroad terminal to operate its business.

"(g) Whether or not the payment was by the time or by the job;"

The Railroad contracted with Baker Driveaway to unload these automobiles for a base rate of $2.00 for each car unloaded during a regular working day and $2.75 for each car unloaded on weekends and holidays. Baker Driveaway hired its own employees (who were members of the Teamsters Union) and paid them by the hour.

Of course, plaintiff's version of the facts was somewhat in conflict with defendant. Plaintiff relied especially, for example, on the regular visits of Railroad employees to the terminal to check damaged automobiles. But the point is that there were factors on both sides, making the question of employment one which under the normal rules of law, only the jury could resolve.

Under the usual rules governing the granting of summary judgment, the existence of any one of these conflicts of fact would have compelled a denial of the motion. Yet, apparently feeling that the *Sinkler* "operational activity test" (*Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 78 Sup. Ct. 758, 2 L.Ed.2d 799) had modified the criteria set out in the Restatement of Agency, 2d., §220, and approved in *Ward* and *Baker, supra,* the Circuit Court approved the District Court's award of summary judgment. Hence, this writ of certiorari. The defendant, Norfolk & Western Railway, and the bar and bench need to know whether summary judgment in FELA cases is to be granted under unique criteria.

Respectfully submitted,

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